

## **REMARKS**

### **I. Status of the Claims**

Despite some confusion resulting from the last Office Action, Applicants respectfully submit that 1-8, 15-17, 33-44, 65-76, 97-108, and 137-140 are pending. Claims 9-14, 18-31, 45-63, 77-95, 109-127, 129-136, and 141-151 have been withdrawn. Claims 32, 64, 96, and 128 have been cancelled.

### **II. Withdrawal of Notice of Appeal**

Applicants filed a Notice of Appeal on February 28, 2006. Applicants now withdraw the Notice of Appeal and present this Request for Continued Examination.

### **III. Summary of the Substance of the Interview**

The Applicants wish to thank the Examiner for extending the courtesy of an in-person interview on May 23, 2006 ("Interview"). During the Interview, the Examiner and Applicants discussed claims 1, 33, and 65. The parties agreed that Mault 6,478,736 ("Mault") teaches away from a device having two sensors adapted to generate data during non-sedentary activities. Therefore, the parties agreed that an amendment to the claims reciting two sensors generating data during non-sedentary activities will overcome the rejections based on Mault. Claim 97 was not discussed because at the time it was believed that claim 97 was withdrawn from consideration. During a subsequent discussion, it was agreed that claim 97 was not withdrawn from consideration and that it was indeed a pending claim.

#### **IV. Applicants' Response to Rejections**

The Examiner rejected claims 1-8, 15-16, 33-40, 42-44, 65-72, 74-76, and 137-139 as being anticipated by Mault. In response and as discussed during the Interview, Applicants have amended independent claims 1, 33, 65, and 97<sup>1</sup> to recite two sensors generating data during non-sedentary activities. Therefore, a user of the claimed invention does not necessarily have to remain sedentary for any period of time.

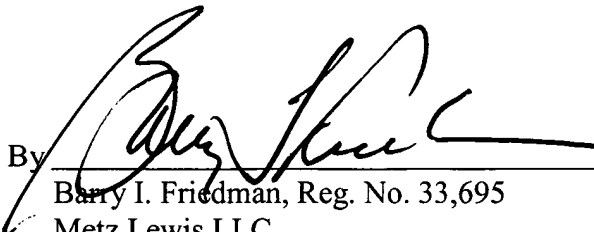
In contrast, Mault teaches the use of a specific calorimeter co-invented by James Mault, which is described in U.S. Patent Application Serial No. 09/630,398 and Issued U.S. Patent 6,446,222 to Mault et al. ("Mault '222"). Mault '222 describes an indirect calorimeter for measuring the resting metabolic rate (RMR) of a subject. Further, because it is measuring RMR, Mault '222 teaches that the device and subject must be sedentary during use. See Mault '222, Col. 23, Ins. 27-34. Mault '222 states that a person should be "fully relaxed" for the device to work properly. See Mault '222, Col. 24, Ins. 11-12. Moreover, the device will indicate an error if a person is breathing too rapidly as would be done in an active state, such as during exercise. See Mault '222, Col. 24, Ins. 1-5. Thus, a fixed device obtaining data from a sedentary subject is a requirement of Mault '736, the primary reference. By specifically requiring the use of a fixed device that requires the subject to be sedentary, Mault '736 fails to anticipate the invention as claimed in claims 1, 33, 65, and 97. And as agreed in the Interview, Mault teaches away from two sensors generating data during non-sedentary activities.

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<sup>1</sup> The Examiner did not reject claim 97, therefore, Applicants are not admitting that Mault anticipated claim 97 in its previous form. Rather, Applicants amend claim 97 for the sake of more clearly defining the subject matter which is claimed.

Accordingly, the rejections of claims 1, 33, and 65 and their dependent claims are overcome. Similarly claim 97<sup>2</sup> and its dependent claims are allowable. Thus, Applicants respectfully submit that claims 1-8, 15-17, 33-44, 65-76, 97-108, and 137-140 are in condition for allowance.

Respectfully submitted,

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<sup>2</sup> See n.1